

IN THE SUPREME COURT OF THE UNITED STATES

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BERNARD THOMAS, PETITIONER

v.

UNITED STATES OF AMERICA

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion in determining that petitioner's sentence should include a special condition of supervised release requiring a psychosexual evaluation, where petitioner's current offense of conviction was not a sex offense but petitioner was previously convicted of a sex offense involving a minor and had never been assessed for or received sex-offender treatment.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (E.D.N.Y.):

United States v. Thomas, No. 16-cr-147 (Dec. 13, 2017)

United States v. Thomas, No. 16-cr-147 (Aug. 5, 2019)

United States Court of Appeals (2d Cir.):

United States v. Thomas, Nos. 17-4022 & 18-106 (Mar. 20, 2019)

United States v. Thomas, No. 19-2410 (Sept. 16, 2020)

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No. 20-7189

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OPINIONS BELOW

The summary order of the court of appeals (Pet. App. A1-A8) is not published in the Federal Reporter but is reprinted at 827 Fed. Appx. 72. The memorandum and order of the district court (Pet. App. A9-A23) is not published in the Federal Supplement but is available at 2019 WL 3543627. A prior summary order of the court of appeals is not published in the Federal Reporter but is reprinted at 765 Fed. Appx. 553. A prior memorandum and order of the district court is not published in the Federal Supplement but is available at 2017 WL 6375741.

## JURISDICTION

The judgment of the court of appeals was entered on September 16, 2020. The petition for a writ of certiorari was filed on December 11, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of possessing ammunition following a felony conviction, in violation of 18 U.S.C. 922(g)(1). Judgment 1. The district court sentenced petitioner to 51 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed petitioner's conviction but vacated his sentence and remanded the case to permit the district court to consider whether petitioner qualified for an enhanced sentence under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e). 765 Fed. Appx. 553. On remand, the district court again sentenced petitioner to 51 months of imprisonment, to be followed by three years of supervised release. Am. Judgment 2-3. The court of appeals affirmed. Pet. App. A1-A8.

1. On February 29, 2016, a person was shot outside a public housing complex in Queens, New York. Revised Presentence Investigation Report (Rev. PSR) ¶ 3. Video surveillance showed petitioner running after the wounded victim and holding a firearm. Ibid. Later that day, petitioner notified the New York Police

Department that he was in possession of a shell casing from a recent shooting. Id. ¶ 4. During an interview with the police, petitioner identified himself as the person in the surveillance video holding the firearm, but claimed that his drug dealer paid him to hold the firearm and that he returned it to his dealer later that night. Id. ¶¶ 4-5. Petitioner's dealer, however, was in the hospital at the time of the shooting. Id. ¶ 5. A federal grand jury in the Eastern District of New York returned an indictment charging petitioner with one count of possessing ammunition following a felony conviction, in violation of 18 U.S.C. 922(g)(1). Indictment 1. At trial, the jury was unable to reach a unanimous verdict, and the district court declared a mistrial. D. Ct. Doc. 66 (Aug. 3, 2016). A subsequent federal grand jury in the Eastern District of New York returned a superseding indictment, again charging petitioner with one count of possessing ammunition following a felony conviction, in violation of 18 U.S.C. 922(g)(1). Superseding Indictment 1. The jury found petitioner guilty. Verdict Sheet 1.

The district court sentenced petitioner to 51 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. In addition to imposing standard conditions of supervised release, the court included several special conditions of supervised release, including a requirement for a psychosexual evaluation. Judgment 3-5.

The court of appeals affirmed petitioner's conviction, vacated his sentence, and remanded the case for resentencing to permit the district court to determine whether petitioner was an armed career criminal under the ACCA. 765 Fed. Appx. 553. Although petitioner had challenged the psychosexual-evaluation condition of supervised release on appeal, the court of appeals concluded that it "need not address [that] argument[] at this time" because it was remanding the case for resentencing. Id. at 558. The court noted that, during resentencing, the district court would "have an additional opportunity, with the benefit of fully-developed arguments by the defense, to reconsider th[at] condition[] and, if [the court] continues to believe that [the psychosexual-evaluation condition is] appropriate, to explain why that is so." Ibid.

2. In preparation for resentencing and at the district court's direction, see Pet. App. A56-A57, the Probation Office prepared a revised presentence report. The Probation Office recounted that in 1983, when petitioner was 17, he was convicted of first-degree sexual abuse after forcibly removing the pants of a 15-year-old "mentally challenged girl" and having sexual intercourse with her. Rev. PSR ¶ 25. According to court records, the victim was "incapable of consent by reason of being physically helpless." Ibid.

The Probation Office also observed that, following New York convictions for first-degree robbery, assault, and reckless

endangerment in 1999, petitioner spent almost 15 years in State custody. Rev. PSR ¶ 43. The State paroled petitioner in 2014, and, as a special condition of supervision, required him to attend sex-offender treatment. Ibid. Petitioner never entered sex-offender treatment, however, because the intake process and treatment would have exceeded the time remaining on his parole for his state offenses. Id. ¶¶ 43, 71. Based on petitioner's first-degree sexual abuse conviction, and the absence of any indication that petitioner had ever been evaluated for sex-offender treatment, the Probation Office recommended that the district court impose a special condition of supervised release requiring petitioner to undergo a psychosexual evaluation. See Pet. App. A88-A90; see also id. at A19, A21.

Following a resentencing hearing, see Pet. App. A61-A117, at which petitioner and the government agreed that petitioner was not an armed career criminal under the ACCA, id. at A66, the district court sentenced petitioner to 51 months of imprisonment, to be followed by three years of supervised release. Am. Judgment 2-3. In addition to imposing standard conditions of supervised release, the court again included several special conditions of supervised release, including the requirement for a psychosexual evaluation. Id. at 3-5.

Before including that condition, the district court recited petitioner's entire criminal history, which spanned 33 years and, in addition to the first-degree sexual abuse conviction,

encompassed convictions for possessing stolen property, resisting arrest, trespassing, possessing controlled substances, selling controlled substances, reckless endangerment, first-degree assault, and armed robbery. Pet. App. A81-A84; see id. at A13 (district court referring to petitioner's "extraordinary, extensive history of criminal conduct"). Noting petitioner's conviction for first-degree sexual abuse and the fact that petitioner previously had been referred for sex-offender treatment but was not admitted due to timing issues, the court found that the special condition of "a psychosexual evaluation is appropriate and involves no greater deprivation of liberty than is reasonably necessary." Id. at A21; see id. at A107-A108.

3. The court of appeals affirmed in an unpublished summary order. Pet. App. A1-A8.

The court of appeals observed that under 18 U.S.C. 3583(d) a district court has "broad authority" to impose a condition of supervised release if, inter alia, the condition is reasonably related to "the history and characteristics of the defendant"; "protect[ing] the public from further crimes of the defendant"; and "provid[ing] the defendant with needed \* \* \* correctional treatment in the most effective manner," and "involves no greater deprivation of liberty than is reasonably necessary." Pet. App. A3 (citations omitted). The court explained that a district court's statutory authority includes "broad discretion to impose special release conditions related to the defendant's sexual

behavior even when the instant conviction does not involve a sexual offense." Id. at A5.

The court of appeals found that, given petitioner's "criminal history and the serious conduct involved in his conviction for sexual abuse," the district court did not abuse its discretion in the particular circumstances of this case by requiring a psychosexual evaluation. Pet. App. A6. The court of appeals noted that circuit precedent had "approved the consideration of \* \* \* distant convictions in appropriate cases." Ibid. And the court emphasized that the psychosexual-evaluation condition "merely requires [petitioner] to submit to an evaluation and does not necessarily require any further deprivation of [petitioner]'s liberty after the evaluation is complete." Ibid.

#### ARGUMENT

Petitioner contends (Pet. 12-19) that the district court abused its discretion in requiring a psychosexual evaluation as a special condition of supervised release. The court of appeals correctly rejected that argument, and its fact-bound, unpublished summary order does not conflict with any decision of this Court or any other court of appeals. No further review is warranted.

1. Under 18 U.S.C. 3583(d), a district court may include in a sentence "any" special condition of supervised release that it "considers to be appropriate" that is, inter alia, "reasonably related to the factors set forth in [18 U.S.C. 3553(a)(1) and (2)(B), (C), and (D)]." The cross-referenced provisions require

the court to consider "the nature and circumstances of the offense and the history and characteristics of the defendant," and "the need for the sentence imposed" "to afford adequate deterrence to criminal conduct," "to protect the public from further crimes of the defendant," and "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." 18 U.S.C. 3553(a)(1) and (2)(B), (C), and (D). Any one sentencing factor under Section 3553(a) can justify the imposition of a special condition of supervised release. See United States v. Barajas, 331 F.3d 1141, 1146 (10th Cir. 2003) ("[E]very circuit to have decided the issue has held that a condition of supervised release may be imposed despite not being related to every enumerated factor, so long as it is reasonably related to one or more of the factors"). The court must also ensure that a special condition of supervised release "involves no greater deprivation of [the defendant's] liberty than is reasonably necessary" to provide deterrence, protect the public, or facilitate training or treatment, 18 U.S.C. 3583(d)(2), and that the condition "is consistent with any pertinent policy statements issued by the Sentencing Commission," 18 U.S.C. 3583(d)(3).

Consistent with the statutory scheme's reasonable-relation and reasonable-necessity standards, district courts are afforded broad discretion in imposing special conditions of supervised release; appellate courts review such conditions only for abuse of

discretion. See Pet. App. A3; see also, e.g., United States v. Ford, 882 F.3d 1279, 1287 (10th Cir. 2018); United States v. Mercado, 777 F.3d 532, 537 (1st Cir. 2015). Here, the court of appeals reviewed the psychosexual-evaluation condition for compliance with the Section 3583(d) standard and correctly found that the district court did not abuse its discretion in imposing that condition. Petitioner's "history and characteristics," 18 U.S.C. 3553(a)(1), include, in addition to an extensive criminal history spanning decades, see pp. 5-6, supra, a conviction for first-degree sexual assault of a "mentally challenged" and "physically helpless" 15-year-old girl, Rev. PSR ¶ 25. Petitioner's history and characteristics likewise include a prior New York supervised-release condition that required him to attend sex-offender treatment, which petitioner never commenced. See id. ¶¶ 43, 71.

In addition, the psychosexual-evaluation condition furthers the goals of "protect[ing] the public from further crimes of the defendant" and "provid[ing] the defendant with needed \* \* \* medical care, or \* \* \* correctional treatment," 18 U.S.C. 3553(a)(2)(C) and (D), by providing his probation officer with a baseline assessment of whether petitioner remains a risk to the community or is in need of treatment -- a risk factor that is currently unknown because petitioner has never had a sex-offender assessment or received treatment. And the supervised-release condition does not deprive petitioner of liberty more than

reasonably necessary, 18 U.S.C. 3583(d)(2), because it "merely requires [petitioner] to submit to an evaluation and does not necessarily require any further deprivation of [petitioner]'s liberty after the evaluation is complete." Pet. App. A6; see United States v. Prochner, 417 F.3d 54, 64 (1st Cir. 2005) (finding that, even though the defendant had never been convicted or accused of sexual assault or misconduct, the mere requirement to undergo "sex offender evaluation" did not impose "any greater deprivation of liberty than is reasonably necessary for the purposes of supervised release").

In all events, whether a special condition of supervised release is warranted under the Section 3583(d) standard is a highly fact-specific determination that is dependent on the unique circumstances of each case. The court of appeals' fact-bound decision based on one particular application of this standard does not warrant further review. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."). That is particularly so given that the court of appeals and district court are in accord. See Kyles v. Whitley, 514 U.S. 419, 456-457 (1995) (Scalia, J., dissenting) ("[U]nder what we have called the 'two-court rule,' the policy [against reviewing fact-bound decisions] has been

applied with particular rigor when [the] district court and court of appeals are in agreement as to what conclusion the record requires.").

2. Petitioner asserts (Pet. 14-19) that the court of appeals' decision conflicts with decisions of other courts of appeals that have reversed special conditions of supervised release premised on remote convictions for sex offenses. No such conflict exists, and further review of the decision below is unwarranted.

In a number of the decisions on which petitioner relies to support his claim of a circuit conflict, the courts of appeals affirmed special conditions of supervised release -- often on the basis of facts similar to the facts in this case. For example, a number of the decisions on which petitioner relies (Pet. 16-17) affirmed the application of special conditions of supervised release requiring sex-offender assessments when the sex offense was remote but the defendant never received evaluation or treatment. See Ford, 882 F.3d at 1287-1288 (upholding a special condition requiring sex-offender risk assessment based on a 19-year-old conviction for a sex offense involving a minor and where no evidence showed that the defendant had ever received sex-offender treatment); United States v. Bear, 769 F.3d 1221, 1228-1232 (10th Cir. 2014) (similar for 12-year-old conviction); United States v. Vinson, 147 Fed. Appx. 763, 766, 772-773 (10th Cir. 2005) (per curiam) (similar for a special condition requiring both sex-

offender risk assessment and psychological testing based on nine-year-old convictions), cert. denied, 547 U.S. 1072 (2006).

In other cases that petitioner cites (Pet. 14-15), the courts of appeals affirmed the imposition of special conditions of supervised release that were far more onerous than a sex-offender assessment. See United States v. Pabon, 819 F.3d 26, 29, 31-35 (1st Cir.) (upholding numerous sex-offender special conditions, including requiring the defendant to participate in sex-offender treatment, undergo a polygraph test, and have limited contact with minors, based on a three-year-old conviction for a sex offense against a minor and the defendant's extensive criminal history), cert. denied, 137 S. Ct. 345 (2016); United States v. Brogdon, 503 F.3d 555, 558, 564-566 (6th Cir. 2007) (upholding numerous sex-offender special conditions, including requiring the defendant to participate in sex-offender treatment and have limited contact with minors, based on convictions for sex offenses that were all at least 12 years old, some of which involved minors), cert. denied, 552 U.S. 1211 (2008). None of the decisions upholding supervised-release conditions indicates that another court of appeals would have found an abuse of discretion here.

Nor do decisions that he cites that reverse supervised-release conditions. Several of them reversed the application of special conditions of supervised release requiring sex-offender treatment, rather than evaluation, like the condition here. See Pet. 15-16; United States v. Johnson, 756 F.3d 532, 541 (7th Cir.

2014) (concluding that a 15-year-old conviction for a misdemeanor sex offense did not support a special condition requiring sex-offender treatment where the “only potential support in the record” for the condition was the prior misdemeanor); United States v. T.M., 330 F.3d 1235, 1240 (9th Cir. 2003) (concluding that a 40-year-old dismissed sex charge and a 20-year-old conviction for a sex offense, “without more,” were not enough to support the imposition of several special conditions, including additional sex-offender treatment, where the defendant had previously undergone sex-offender treatment); United States v. Scott, 270 F.3d 632, 636 (8th Cir. 2001) (concluding that a 15-year-old conviction for a sex offense did not justify the imposition of a number of “special conditions of sex offenders,” including sex-offender treatment, where there was “no evidence supporting the need for the special conditions in [that] case”). None of the case-specific conclusions in those cases would foreclose affirmance here.

Similarly, a number of the other decisions on which petitioner relies (Pet. 14-15, 17) are inapposite because they reversed special conditions of supervised release that had more significant ramifications for the defendants’ liberty interests than do conditions requiring sex-offender evaluation or treatment. See United States v. Fey, 834 F.3d 1, 3-8 (1st Cir. 2016) (reversing a special condition limiting the defendant’s right to generally associate with minors based on a 17-year-old conviction for a sex

offense involving a minor, but upholding special conditions limiting his contact with minors in the workplace and requiring him to undergo sex-offender evaluation); United States v. Worley, 685 F.3d 404, 408 (4th Cir. 2012) (reversing special conditions of release that barred the defendant from contacting minors and forming relationships with individuals who had custody of minors that were imposed based solely on two 12-year-old convictions for sex offenses involving a minor); United States v. Mike, 632 F.3d 686, 690-691, 698 (10th Cir. 2011) (reversing a special condition that barred the defendant from engaging in an occupation with access to children, which was based on a 14-year-old sex offense, because the condition constituted an impermissible occupational restriction that could not be imposed without the district court making specific findings); see also United States v. Kent, 209 F.3d 1073, 1075-1078 (8th Cir. 2000) (reversing supervised-release condition where the record provided no indication that the defendant had ever been convicted of assault- or sex-related offenses) (cited at Pet. 16).

Petitioner identifies (Pet. 15-16) only three cases in which courts of appeals reversed special conditions of supervised release requiring sex-offender evaluations based on remote convictions for sex offenses, and none of the decisions conflicts with the court of appeals' decision below. In United States v. Dougan, 684 F.3d 1030 (2012), the Tenth Circuit reversed a number of special sex-offender conditions of release, including

assessment and treatment requirements, along with limitations on the defendant's contact with minors -- all based on 16- and 32-year-old convictions for sex offenses that did not involve minors -- where nothing indicated that the defendant had avoided a prior requirement for sex-offender treatment. See id. at 1031-1036. The Tenth Circuit concluded that "[o]n the facts presented in this case," the defendant's prior convictions were "too remote in time to be reasonably related to the imposition of special sex-offender-related conditions." Id. at 1037. It would not be precluded from reaching a different result here.

The decisions that petitioner relies on from the Sixth and Ninth Circuits likewise do not conflict with the summary order below. In United States v. Thomas, 212 Fed. Appx. 483 (6th Cir. 2007), the Sixth Circuit reversed a special condition of supervised release that required the defendant to participate in a sex-offender assessment program based on a 20-year-old sex offense where "no evidence [was] presented other than the fact of the prior conviction to justify" the condition and "the probation officer admitted there were no 'red flags.'" Id. at 487. And in United States v. Sharp, 469 Fed. Appx. 523 (2012), the Ninth Circuit reversed special conditions of release that required the defendant to undergo a sex-offender evaluation and receive treatment for sexual deviancy if directed to do so by his probation officer based on a ten-year-old sex offense. Id. at 525. The court found "no apparent justification" for the conditions in the record "and the

district court did not provide one," and concluded that the conviction was "too remote to justify the conditions by itself." Ibid. But the court of appeals permitted the district court to "consider reimposing the conditions" on remand, so long as they were "justif[ied] \* \* \* with specific, relevant findings supported by the record." Ibid.

The courts of appeals' different resolutions of cases involving different special conditions and different defendants with different criminal histories does not show that any court of appeals would have reached a different outcome in the circumstances of this particular case. The district court did not require petitioner to undergo full sex-offender treatment or impose more stringent conditions, such as limiting his contact with minors. Instead, the court merely required petitioner to undergo a psychosexual evaluation -- a condition with less significant implications for a defendant's liberty interests. Cf. pp. 9-10, supra. And petitioner was not ordered to undergo a psychosexual evaluation based solely on his remote conviction for a sex offense. Rather, the courts below also relied on petitioner's extensive criminal history since his conviction for first-degree sexual assault and the fact that petitioner was previously ordered to engage in sex-offender treatment -- but never underwent that treatment. See Pet. App. A6, A21, A81-A84, A107-A108.

In contrast to the cases on which petitioner relies, which involve specific circumstances, in cases involving facts similar to the facts of this one courts of appeals routinely affirm the imposition of special conditions of supervised release requiring sex-offender evaluations (or even treatment). See, e.g., pp. 11-12, supra; see also, e.g., Sealed Appellee v. Sealed Appellant, 937 F.3d 392, 401 (5th Cir. 2019) (upholding a special condition requiring sex-offense assessment based on convictions that were at least 14 years old for sex offenses involving minors where there was "no evidence that [the defendant] has ever received sex-offender treatment, and it is uncertain whether he remains a danger to the community"); United States v. Silver, 685 Fed. Appx. 254, 255-256 (4th Cir. 2017) (per curiam) (upholding a special condition requiring a psychosexual evaluation based on a 16-year-old sex offense involving a minor, where the defendant had violated his terms of probation for the sex offense, which had resulted in a revocation of probation); Mercado, 777 F.3d at 538 (upholding a special condition requiring sex-offender treatment where "the defendant had been convicted of sexually assaulting a minor \* \* \* ten years prior to sentencing" and had engaged in "persistent criminal involvement over the intervening years"). No sound reason exists for this Court to review the summary order here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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